

Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements

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I. Introduction

IN BOTH BRITAIN AND THE UNITED STATES the external costs of private land development have, over the past fifteen years, been increasingly borne by private land developers rather than public agencies. In return for obtaining permission to develop, they have been willing to contribute money, land and facilities. Sometimes the transaction is designed to overcome a sustainable planning objection to development proceeding, such as where an on-site obligation like car parking is commuted into a financial contribution enabling the authority to provide equivalent off-site parking (known in the United States as an "in-lieu" fee and in Britain as a "commuted obligation"). Or the contribution may overcome a valid prematurity objection by allowing off-site infrastructure to be provided earlier than it would be under the public agency's capital programme. But there have also been instances when the link between the contribution offered by the developer (or required by the local authority), and the development being permitted, is stretched so far as to become almost invisible.

In Britain, all these activities are commonly referred to as "planning gain," an expression often used carelessly¹ to encompass all contributions made by developers to local authorities and other public agencies in land, buildings, or money, but without distinguishing between those that legitimately fulfill some planning purpose and those that do not. Britain lacks any rational system of infrastructure contributions through which costs may be apportioned between different developers, or between existing and new residents, on a predetermined basis,² so that individually negotiated settlements provide the only solution.

In the United States it has been customary to divide such transactions into three primary categories (often generally characterised as "paying for growth"):³ Exactions, dedications and fees, although each is a description of the form the deal takes rather than of its legitimacy. An "exaction" is a requirement that the developer provide some facility, either on-site or off-site. A "dedication" involves the voluntary contribution of land to the local authority, which may be commuted into a fee, particularly on small scale sites. Under the schemes for "impact fees," now operated in several states, the developer is charged a fee that is calculated in accordance with the type, scale and location of the proposed development and is applied to mitigate its impact on the community. A

1. See, e.g., Department of the Environment Circular 22/1983, which advises: "Planning gain" is a term which has come to be applied whenever, in connection with a grant of planning permission, a local planning authority seeks to impose on a developer an obligation to carry out works not included in the development for which permission has been sought or to make some payment or confer some extraneous right or benefit in return for permitting the development to take place. As such, it is distinct from any alterations or modifications which the local planning authority may properly seek to secure to the development that is the subject of the planning application—such as changes intended to reduce the scale or intensity of the proposed development, or to improve its layout or its impact on the local environment. . . . In some cases the developer may offer some such works or payment in applying for planning permission or in the course of subsequent negotiations: the advice in this circular is relevant in those circumstances as well as to cases where the authority seeks to impose such obligations.

Department of the Environment Circular No. 22/1983, ¶ 2. However, this approach has been abandoned in a proposed redrafting of that advice contained in a 1989 Consultation Paper, which seeks to relinquish the expression "planning gain" altogether. Different descriptions, such as "community advantages," are sometimes encountered in local authorities' own development plans.

2. *But see* WATER ACT 1989, § 79, which now allows the post-privatisation water companies to levy fixed-rate connection charges in respect of new residential development. It is intended to assist funding capital costs in constructing major plants, such as sewage treatment plants, and is in addition to the requisitioning powers carried through to the 1989 Act from the WATER ACTS 1945 and 1973, under which developers are entitled, in return for contributing to the cost, to require main water services to be brought to their sites.

3. See, e.g., O. DAVIDSON & A. USAGAWA, *PAYING FOR GROWTH IN HAWAII: AN ANALYSIS OF IMPACT FEES AND HOUSING EXACTION* (1988).

properly designed fees system attempts to allocate infrastructure costs equitably between developers in accordance with an adopted schedule of capital facilities, and to offer a guarantee that the infrastructure will actually be provided within a specified time, or the fee returned. Some British local governments have experimented tentatively with similar arrangements, but against a backcloth of considerable legal uncertainty.⁴

Two further aspects of contemporary United States practice in some municipalities also call for mention, because they also fall within what the British regard as "planning gain." The first is "linkage," under which developers of high value commercial schemes in downtown locations are required to contribute to, say, an affordable housing scheme in the suburbs, on the premise that further commercial property development in the city will raise housing prices and drive out poorer would-be homeowners. The second aspect, often tied in with linkage, is the use of "conditional zoning," under which a developer may choose either to develop at the density permitted by the zoning ordinance, or, for a specified "price," to increase the density. The price may be a linkage payment or a set-aside of land for some public purpose.

But how far can developers' contributions be taken without becoming simply an alternative form of local taxation or a price tag attached to the right to develop? To answer that question, it is necessary to first understand the economic pressures that have led to the present situation. There are doubtless many reasons for the "developer pays" trend,⁵ but three stand out as having overwhelming importance: (1) the growing economic imbalance between the private and the public sector in land development in an era of ideological commitment to privatisation, low taxes and limited government; (2) the possession by local authorities of broad regulatory powers which have substantial financial implications for developers but which are often financially neutral in their effects on the authorities themselves (particularly in Britain, for reasons elaborated upon below); and (3) uncertainty as to the applicable law and policy.

4. The British Government announced in September 1990, its interest in reviewing United States experience with impact fees, but no policy or legislative commitment has yet ensued.

5. The factors contributing to the growth of planning gain in England and Wales are analysed in Jowell and Grant, *Guidelines for Planning Gain?*, [1983] J.P.L. 427. Planning gain is less commonly encountered in Scotland because of the different economic conditions of land development, although there is some experience of planning agreements. See *infra* note 14.

II. Local Government Finance

There has been sustained pressure on local government finance in both countries. In the United States, the *ad valorem* real property tax, or rates, together with odd user fees, sales tax, and income tax, has proved insufficient to make up the shortfall of revenues needed to fund necessary infrastructure; attempts to increase the rate of local taxes have met with taxpayer revolts. Local residents have objected particularly to paying through taxation for the infrastructure necessary to accommodate further unwanted (by them) development in their areas.

The same is true in Britain, where local authorities and (until their privatisation in 1989) water authorities have endured tight centralised controls over capital expenditure as part of the Thatcher Government's pursuit of reductions in the public sector borrowing requirement. Downward pressure has also been applied to revenue expenditure through successive measures, including block grant readjustments and rate capping, and culminating in the community charge (or "poll tax").⁶ This measure seeks to control local expenditure very tightly, because marginal expenditure⁷ is met in full by adult chargepayers without any further subsidy from government grant or the national nondomestic rate. It thus bites sharply on the pockets of adult citizens, and the government expects that ballot box sensitivity will induce local politicians to keep spending down. But there is no incentive to local politicians under this system to permit new development to occur so as to swell local revenues. All property tax (the "rates") revenues on *commercial* property are now paid to the central government, and redistributed to all local authorities on a *per capita* basis. Moreover, the allocation of government grants is designed to even out the resource differences between local authorities. New *residential* development increases the tax base for community charge, but also increases the cost of services to be met from the charge. Thus the financial consequences for the local planning authority of granting or refusing planning permission are broadly neutral, but the pressure to hold spending down is likely to be tighter in the

6. For a detailed discussion of these measures, see M. GRANT, *RATE CAPPING AND THE LAW* (2d ed. 1985); *LOCAL GOVERNMENT FINANCE ACT 1988* (Sweet & Maxwell, Ltd. eds. 1989).

7. The expenditure beyond the level that central government assumes to be necessary for each authority to deliver a common level of services. Expenditure up to that level is underwritten (1) by national nondomestic rate, which is a property tax on all commercial and industrial property and is now levied and collected nationally, and redistributed to local governments by the Treasury on a per capita basis; and (2) by revenue support grant met from national taxation, calculated for each authority according to a formula which would allow that authority to set a charge corresponding to a standard national level of community charge.

long run (after some complicated short-term transitional readjustments in shifting to the new system). Therefore, the attraction of passing infrastructure costs on to developers is likely to continue to grow.

In contrast with local government, landowners and private developers able to obtain permission to develop, in a buoyant land market in which prices are maintained because of the rationing effects of the planning system, have had resources to finance infrastructure. In Britain, such contributions are generally tax deductible, whether by the developer against corporation tax, or by the landowner from whom he acquires a site and who faces capital gains tax liability. Although determining where the true cost of these contributions actually falls is complicated, the most likely explanation in relation to a green field site is that it bears directly, and in policy terms, most appropriately, upon the price paid for the land by the developer.⁸ Moreover, the scale of contribution required may be relatively insubstantial when set beside fast-rising land values for developable land,⁹ and it has often proved a worthwhile investment to bring development forward in an era when high interest rates make landholding expensive.

Against these pressures, local authorities in both countries have increasingly expected private developers to pay for infrastructure projects, in whole or in part, as a contribution to the public price of private development. In Britain, the trend is not limited to local authorities: Central government has pursued similar aims in regularly seeking developers' contributions (commonly at the rate of 100 percent) to finance new works on main highways where they are required to accommodate new development.¹⁰

However, this trend raises profound legal issues about the propriety of such requirements and the point at which the line is to be drawn between legitimate and illegitimate practice. It is not surprising that the same questions are being asked on both sides of the Atlantic. How close must the linkage or nexus be between the exaction, fee, or dedication

8. See Grant, *Planning and Land Taxation: Development Land Tax and Beyond-I*, [1986] J.P.L. 4, 52.

9. Land which has a value of £2,500 per acre in its agricultural use may currently change hands at as much as £300,000 with planning permission and services for residential development, allowing a generous margin against which to set servicing costs.

10. Now in the process of being formalised by powers contained in the NEW ROADS AND STREET WORKS BILL 1990, cl. 20, substituting a new § 278 in the HIGHWAYS ACT 1980. For the background to this measure, see DEPARTMENT OF TRANSPORT & THE WELSH OFFICE JOINT NOTE, DEVELOPMENT IN THE VICINITY OF TRUNK ROADS: GUIDANCE TO DEVELOPERS ON AGREEMENTS UNDER SECTION 278 OF THE HIGHWAYS ACT 1980, April 1989; DEPARTMENT OF TRANSPORT, NEW ROADS BY NEW MEANS: BRINGING IN PRIVATE FINANCE Cm 698, ¶¶ 6-10, May 1989.

and the need for new public improvements that the proposed land development will generate? Is it enough that there is a public need or must there be something more? The difference between the approach of the two countries is that these questions are regarded in the United States as issues of law, to be resolved against the basic precepts of the United States Constitution, and particularly the prohibition against the "taking" of property without just compensation.¹¹ There has been some important litigation in the United States Supreme Court in recent years. In Britain, the picture is far more confused. Advice issued by the Department of the Environment has attempted to draw distinctions between good and bad practice, but has often simply been ignored in the unholy alliance that sometimes exists between developers and local authorities. The government's signals remain obscure, not least in its presenting a Bill¹² to Parliament in late 1990 which seeks to reform the machinery through which planning gain is negotiated so as to allow developers to give unilateral undertakings to local authorities, as well as to enter into binding agreements. The Bill reforms procedure, but seems to reflect no new thinking on the substance.

III. The Basis of British Planning Control

In Britain, the legal basis for planning gain is the power of local planning authorities to grant or refuse planning permission. Although there is some limited "as of right" development, it is defined by national legislation¹³ rather than by local zoning. All other development requires planning permission, and the local authority has wide discretion in deciding whether or not to grant such permission. Their development plan is not determinative: They must "have regard to" its provisions, and also to any other "material considerations."¹⁴ The applicant has a right of appeal to the Secretary of State against adverse exercise of that power, but appeal takes

11. Bosselman & Stroud, *Legal Aspects of Development Exactions*, DEVELOPMENT EXACTIONS (Frank & Rhodes, eds. 1987); Callies, *Property Rights—Are There Any Left?*, 20 URB. LAW. 597 (1988); Peterson, *Land Use Regulatory Approaches Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335 (1988).

12. The PLANNING AND COMPENSATION BILL 1991, cl. 12 of which substitutes a new § 106 in the TOWN AND COUNTRY PLANNING ACT 1990. The 1990 Act is a consolidation of earlier planning legislation, and § 106 is the successor to § 52 of the TOWN AND COUNTRY PLANNING ACT 1971.

13. The TOWN AND COUNTRY PLANNING GENERAL DEVELOPMENT ORDER 1988 and the TOWN AND COUNTRY PLANNING (USE CLASSES) ORDER 1987.

14. TOWN AND COUNTRY PLANNING ACT 1990, § 70(1). In Scotland agreements are made under the corresponding provisions of the TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1972, § 50. For a detailed account, see E. YOUNG AND J. ROWAN-ROBINSON, *PLANNING LAW AND PROCEDURE IN SCOTLAND* (1985).

some time, often over a year, and provides no guarantee of permission at the end of the process. It is a "one-stop" permitting process. There is no separate system of subdivision controls, and other new requirements—such an environmental impact assessment—have simply been integrated into the planning system rather than established alongside it. Adverse environmental impact is a "material consideration" entitling a local authority to refuse planning permission.

Although the local planning authority has a clear statutory power to impose any conditions it thinks fit when granting permission, courts have read restrictions into the power. To be valid, a planning condition must relate fairly and reasonably to the permitted development, it must be imposed for a "planning" purpose, and it must not be manifestly unreasonable.¹⁵ Conditions which require the payment of money—for whatever purpose—or the dedication of land, are regarded as breaching the third of those tests, even though the payment is intended to meet some off-site requirement uniquely generated by the development and the sum involved is reasonable.¹⁶ It is a doctrinal, not an economic, criterion. Thus, in Britain, exactions, dedications and fees are forced off the face of the planning permission. Instead, they are negotiated against the backcloth of the authority's discretionary power to withhold permission altogether (or its practical ability to delay granting it), but are then recorded as private contractual arrangements. Local planning authorities have various powers¹⁷ to enter into agreements with landowners, of which the most important features are not only that they may be enforceable against successors in title (and so inescapable by mere winding-up or insolvency) but are also largely non-appealable.¹⁸ At one time it was widely assumed that such agreements were not confined by the tests for validity applicable to planning conditions, but that belief has been badly shaken by recent judicial pronouncements.¹⁹ But it is clear that a local planning authority's decision would be challengeable by judicial review if it could be shown that the authority had granted or refused planning

15. *Newbury District Council v. Secretary of State for the Environment*, [1981] A.C. 578.

16. *Bradford City Council v. Secretary of State for the Environment*, [1986] J.P.L. 598, (1986) 53 P. & C.R. 55.

17. The best known is § 106 of the TOWN AND COUNTRY PLANNING ACT 1990 (formerly known as § 52 agreements), but also important are the LOCAL GOVERNMENT (MISCELLANEOUS PROVISIONS) ACT 1982, § 33; the GREATER LONDON COUNCIL (GENERAL POWERS) ACT 1974, § 16 (for local authorities in the Greater London area); and the HIGHWAYS ACT 1980, § 278 (for highways purposes, although not binding against successors in title). For the full texts of these provisions, see *ENCYCLOPEDIA OF PLANNING LAW AND PRACTICE* ¶ P106 (Grant ed. 1991).

18. See *infra* notes 97–99 and accompanying text for exceptions.

19. See *infra* note 97.

permission on the basis of a financial deal that did not relate in planning terms to the development involved. Its decision in such a case would have been actuated by considerations which were not "material," and hence would be outside their statutory discretion.²⁰

Yet the prospect of challenge in any given case is remote. If planning permission is refused, the applicant has his remedy of appeal to the Secretary of State, and the prospect of an award of costs against the planning authority if its conduct has been unreasonable. If permission is granted, the developer has no interest in starting proceedings which will put his permission at risk and delay development, and third parties are likely to lack the information and resources necessary to go to court.

IV. The Basis of Planning Controls in the United States

The British planning system, though administered primarily by local government, is nonetheless highly centralised and comparatively uniform in its application throughout the country. But, in the United States, the federal system of fifty states encourages greater variety in the systems of planning and development control, and hence in the mechanisms for securing planning gain in the form of dedications, exactions and fees.

The control of land use in the United States is principally a local government function.²¹ There is no national uniformity, and no central government agency with functions equating to those of England's Department of the Environment. The only measure of national importance is the rough framework provided by a federally drafted (but not imposed) Standard Zoning Enabling Act,²² which was adopted by most states following a 1926 United States Supreme Court decision which upheld the most ubiquitous of the local land-use controls, the zoning ordinance.²³ Therefore, both subdivision and zoning regulations in the United States are functions of local governments which derive their power to regulate the use and development of land from enabling legislation made by each

20. See, e.g., the Covent Garden case, *R. v. Westminster City Council, ex parte Monahan*, [1989] J.P.L. 107; [1989] 1 P.L.R. 36, especially the argument of Staughton, L.J. (adapting the criteria for planning conditions) that, to be material, a consideration must fairly and reasonably relate to the permitted development.

21. Garner & Callies, *Planning Law in England and Wales and in the United States*, 1 ANGLO-AM. L. REV. 292 (1972); R. BABCOCK & O. WEAVER, *CITY ZONING: THE ONCE AND FUTURE FRONTIER* (1986).

22. A Standard State Zoning Enabling Act under which municipalities may adopt zoning regulations (United States Dept. of Commerce, 1926).

23. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

state.²⁴ State legislation is necessary because the exercise of land-use controls is considered to be an exercise of the police power,²⁵ and that power resides with the individual fifty states (and not the national government) under the federal system of government. The principal limit upon state power so delegated is found in the fifth amendment to the United States Constitution, which, as applied to the individual states by the fourteenth amendment, forbids the taking of property except for a public purpose and upon payment of just compensation.²⁶ Under certain circumstances, a land-use regulation which on its face deprives a landowner of all economic use without being based on health, environmental protection, or protection of fiscal integrity, or which as applied takes all use of such property and which interferes with legitimate investment-backed expectations of the owner, is likely to be a constitutionally protected taking for which compensation is required, even if the taking is "temporary."²⁷ It is this area of the law which provides a basis for litigation over exactions, fees, and dedications: To what extent are they, even though exercises of the police power, takings of property requiring compensation? These requirements are usually exacted through the subdivision, rather than the local zoning ordinance.²⁸

A. Subdivision Controls

Control over the subdivision of land ownership, although unknown in England, provides the principal means of controlling new development in many countries. Its use in the United States for the regulation of land and

24. Garner & Callies, *supra* note 21; D. MANDELKER, *LAND USE LAW* ch. 9 (2d ed. 1982); D. HAGMAN & J. JUERGENSMEYER, *URBAN PLANNING & LAND DEVELOPMENT CONTROL LAW* ch. 7 (1986); C.D. SANDS & M. LIBONATI, *LOCAL GOVERNMENT LAW* ch. 16 (1981).

25. This refers to the constitutional power of state legislatures to take action to promote health, safety, morals or general welfare.

26. F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* ch. 8 (1973).

27. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (compensation, rather than merely declaratory and injunctive relief, is available for some regulatory takings, even if only "temporary," unless "insulated by the state's power to enact safety regulations").

28. Local zoning is delegated from the state, the repository of police power, to units of local government through the aforesaid zoning enabling act, based loosely on the Standard Zoning Enabling Act. Such acts *permit*, but do not *require*, local governments to divide the land area in their jurisdiction into districts or zones, and to list permitted uses, their permitted height and density ("bulk" regulation) and conditional uses in each. The map upon which the districts are drawn is called the "zoning map," and the lists of uses, bulk regulations, definitions and so forth are collectively called the "text." Also in the text are administrative regulations setting forth how the zoning ordinance restrictions on a particular piece of property may be changed. There is also usually a section in the text dealing with uses which were permitted at some past date, but now fail to conform to the existing land use regulations for the district, called collectively "non-conformities." See Garner & Callies, *supra* note 21.

the dedication of public improvements is a relatively recent land-use control technique.²⁹ The modern subdivision ordinance developed from local responses to so-called "plat acts" whereby it was declared to be legislative policy that no parcels should be divided and sold without the filing of a plat, a scaled drawing of the parcel showing the division or divisions into which it had been carved. Its purpose was to aid conveyancing. In most common law jurisdictions, the buying and selling of land is subject to so-called "recording" acts. These acts require the recording of land transactions on an officially kept register so that the title, the state of the ownership of a particular parcel, is ascertainable by reference to the title record. Because such recording was a privilege rather than a right, it could be made conditional on fulfilling specified obligations.³⁰

Although a developer benefited by recording a plat, the advantages of exercising the *privilege* of recording decreased as conditions and exactions imposed by the municipality increased in scope and number. Eventually, local governments enacted ordinances *requiring* the recording of a plat prior to the conveyance of any lot. When platting became a requirement, the privilege rationale for imposing exactions became a fiction. Local governments and courts began to rely on the rationale that conditions attached to subdivisions were a rational means of protecting the health, safety and general welfare of the public. But the idea of development as a privilege has not completely died.³¹

At first, subdivision ordinances dealt primarily with an increasing volume of so-called design standards: width and composition of streets and sidewalks, perimeter linkage, uniformity of building setback and the like. Street and road standards often come by way of incorporating by reference an "official map" showing where the community had decided to place its streets. From the design and location of public facilities needed to serve new subdivisions, it was an easy, if not necessarily logical, step to require their construction as a condition of subdivision approval. Thus, many state planning enabling acts directed local subdivision codes to require the building and dedication to the community of the streets, sewers, water mains, sidewalks and other public facilities. The subdivision ordinance was well on its way to becoming a development code by the 1950s.³²

29. For discussions of subdivision laws, their origin and application, see R. FREILICH & P. LEVI, *MODEL SUBDIVISION REGULATIONS: TEXT AND COMMENTARY* (1975); Garner & Callies, *supra* note 21, at 312; D. HAGMAN, *URBAN PLANNING* ch. 9 (1971); D. MANDELKER, *supra* note 24, at ch. 9.

30. *Ridgefield Land Co. v. City of Detroit*, 241 Mich. 468, 217 N.W. 58 (1928).

31. *See Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685, 689 (1981).

32. D. MANDELKER, *supra* note 24, at §§ 9.1-9.3.

A logical step from *regulating* the design of public facilities and their dedication was the first *mandatory showing* of open space and public building sites on subdivision plats, and finally requiring their “dedication” as well. The first, the *showing* of such public uses and consequently prohibiting, even for a short time, an owner’s developing such sites, was both common and practical. Increasing residential construction logically increases the need for schools, police and fire stations and parks. A number of state enabling acts directed that such sites should be held open by a private owner only for a specified length of time, say, a year, by which time the local government either had to purchase the site or let the owner develop it. Even this limited requirement met with owner resistance, sometimes resulting in litigation forcing the local government to pay for the development-free period, as if it were an option to purchase the property.³³

The next step was more problematic: the required dedication of such park, public building and school sites. The theory was much the same as that supporting public improvement or dedication requirements: If an owner of property sought to develop it in such a fashion as to add to the population of a local government in a particular section of its jurisdiction, it should provide its share of the park, school and public building needs thereby generated. If the subdivision were too small to generate the need for a “whole” site, then cash would do, to be paid (hopefully) into a fund for the purchase of such a site as other subdivisions were processed. Indeed, in a spate of recent cases, such mandatory dedication schemes have been upheld in a number of jurisdictions, *usually* so long as the dedication of land is required to fill a need attributable to the developer being asked to make the dedication or contribution.³⁴ Such subdivision “exactions” are therefore increasingly commonplace, and are often viewed as an acceptable growth management tool.

V. Subdivision Conditions:

Exactions, Dedications and Impact Fees

Required exactions and dedications of land *within* the proposed land development have recently been eclipsed by impact fees and exactions for

33. *Lomarch Corp. v. Mayor and Common Council of Englewood*, 51 N.J. 108, 237 A.2d 881 (1968).

34. *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971); *Krughoff v. City of Naperville*, 41 Ill. App. 3d 334, 354 N.E.2d 489 (1976), *aff'd*, 68 Ill. 2d 352, 369 N.E.2d 892 (1977); *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979), *reh'g granted*, 614 P.2d 1257 (1980).

infrastructure *outside* the proposed development. The common law of subdivision in the United States quickly moved to acceptance of conditions precedent to subdivision plat approval that included dedication of land for parks and roads and exactions for construction of traffic, water and sewer improvements within the perimeter of the proposed development.³⁵ Indeed, it was once recommended that such dedications and exactions should be so confined.³⁶ However, a few cases in the 1940s, 1950s, and 1960s recognized that such developments often generate needs for off-site infrastructure, and approved dedications and/or so-called "in-lieu" fees to be levied against such developments to pay for them.³⁷

These, coupled with the aforesaid drastic reductions in revenues available to local governments from traditional *ad valorem* real property taxes and federal government program funds, led in the 1970s to the formulation of one of the most innovative and potentially burdensome (for landowners) mechanisms for the funding of public facilities, made necessary by growth: the impact fee. Recent United States litigation over such fees raises basic legal issues over the propriety of conditions on subdivision generally. Typically, an impact fee is levied upon a development to pay for public facilities the need for which is generated, at least in part, by that development.³⁸ In assessing the validity of such fees and other off-site exactions, courts usually address the relationship between the development upon which the fee was levied and the amount and use planned for the fee. Generally, state courts have used three approaches in determining the reasonableness of this relationship:³⁹

35. R. FREILICH & P. LEVI, *supra* note 29, at 2-3. See, e.g., *Pioneer Trust & Sav. Bank v. Village of Mt. Prospect*, 22 Ill. 2d 352, 176 N.E.2d 789 (1961); *State ex rel. Nowlind v. St. Louis Co.*, 478 S.W.2d 363 (Mo. 1972); *Broes v. Smith*, 304 N.Y. 164, 106 N.E.2d 503 (1952); *McKain v. Toledo City Planning Comm'n*, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971).

36. Reps & Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 1105 (1963).

37. E.g., *Ayres v. City of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (1949); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673 (1966).

38. Callies, *Impact Fees, Exactions and Paying for Growth in Hawaii*, 11 U. HAW. L. REV. 295 (1989); Blaesser & Kentopp, *Impact Fees: The Second Generation*, 38 WASH. U.J. URB. & CONTEMP. L. 55 (1990); Juergensmeyer, *Funding Infrastructure: Paying the Costs of Growth Through Impact Fees and Other Land Regulation Charges*, LINCOLN INSTITUTE OF LAND POLICY MONOGRAPH 85-5 (Feb. 1985); D. CALLIES & R. FREILICH, *CASES & MATERIALS ON LAND USE* ch. 4 (1986).

39. Smith, *A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5 (1987); Callies, *supra* note 38, at 300-307.

1. the "rational nexus" test, as applied by the Florida courts and a growing majority of other jurisdictions;⁴⁰
2. the more restrictive "specifically and uniquely attributable" test, as formerly applied in Illinois and Rhode Island⁴¹ and now largely rejected everywhere; and
3. the less restrictive—indeed generous—"reasonable relationship" test, applied primarily by the California courts and largely rejected by the United States Supreme Court, as discussed below.

This leaves only the rational nexus test. The rational nexus test is the most widely used standard for examining development exactions, particularly the impact fee. First proposed by Heyman and Gilhool in 1964,⁴² the test was quickly picked up by courts in both New York and Wisconsin in landmark dedication and exaction cases.⁴³ According to some commentators, it became the "national standard" by the end of the 1970s.⁴⁴ The test has two parts. First, the particular development must create a "need," to which the amount of the exaction bears some roughly proportional relationship.⁴⁵ Second, the local government must demonstrate that the fees levied will actually be used for the purpose collected, by proper "earmarking" and timely expenditure of the funds.⁴⁶

The Florida courts adopted the rational nexus test for impact fees in a series of recent decisions, beginning with *Contractor & Builders Association v. City of Dunedin*.⁴⁷ There, the Florida Supreme Court upheld the concept of impact fees, even though it struck down the particular ordinance requiring an impact fee for sewer and water connection for

40. See, e.g., *Hernando County v. Budget Inns of Fla., Inc.*, 555 So. 2d 1319 (Fla. Dist. Ct. App. 1990); *Frisella v. Town of Farmington*, 131 N.H. 78, 550 A.2d 102 (1988); *Baltica Constr. Co. v. Planning Bd. of Town of Franklin*, 222 N.J. Super. 428, 537 A.2d 319 (1988); *Batch v. Town of Chapel Hill*, 92 N.C. App. 601, 376 S.E.2d 22 (1989); *Unlimited v. Kitsap County*, 50 Wash. App. 723, 750 P.2d 651 (1988).

41. See, e.g., *Frank Ansuini, Inc. v. City of Cranston*, 107 R.I. 63, 264 A.2d 910 (1970); *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

42. Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964). See also Bosselman & Stroud, *supra* note 11; D. CALLIES & R. FREILICH, CASES & MATERIALS ON LAND USE ch. 4 (1986).

43. *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673 (1966); *Jordan v. Village of Menomonee Falls*, 22 Wis. 2d 608, 137 N.W.2d 442 (1965).

44. See Bosselman & Stroud, *supra* note 11, at 74.

45. Bosselman & Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA L.J. 381, 397-99 (1985); see also *Holmdel Builders Ass'n v. Township of Holmdel*, 129 N.J. 550, 583 A.2d 277 (1990).

46. *Id.*

47. 329 So. 2d 314 (Fla. 1976).

failing sufficiently to restrict the use of fees collected: "In principle, however, we see nothing wrong with transferring to the new user of a municipally owned water or sewer system a fair share of the costs new use of the system involves."⁴⁸

For an impact fee ordinance to be valid, the court held that: (1) new development must generate a need for expansion of public facilities; (2) the fees imposed must be no more than what the municipality would incur in accommodating the new users of the system; and (3) the fees must be expressly earmarked for the purposes for which they were charged.⁴⁹

These requirements were further refined in *Hollywood, Inc. v. Broward County*.⁵⁰ The *Hollywood, Inc.* court upheld an ordinance requiring dedication, an in-lieu fee, or an impact fee as a condition of plat approval, to be used for the capital costs of expanding the county park system.⁵¹ The court held that the ordinance was a valid exercise of the police power:

[W]e discern the general legal principle that reasonable dedication or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents. In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision.⁵²

Seven months later, another Florida court upheld an impact fee for road improvements in *Home Builders & Contractors Association v. Board of Palm Beach County Commissioners*.⁵³ The county ordinance required new land development activity generating road traffic (including residential, commercial and industrial uses) to pay a fair share of the cost of expanding new roads attributable to the new development. The court found that the ordinance met the *Dunedin* tests for a valid impact fee because it recognized that the rapid rate of new development would require a substantial increase in the capacity of the county road system, and tied this need to the new development by a formula based on the

48. *Id.* at 317-18.

49. *See id.* at 318-21.

50. 431 So. 2d 606 (Fla. Dist. Ct. App. 1983), *cert. denied*, 440 So. 2d 352 (1983).

51. *See id.*

52. *Id.* at 612.

53. 446 So. 2d 140 (Fla. Ct. App. 1983). There are many cases in accord. Among the more recent: *City of Hallandale v. Acmar Engineering Corp.*, 560 So. 2d 802 (Fla. Dist. Ct. App. 1990); *Tidewater Ass'n of Homebuilders v. City of Virginia Beach*, No. 900451 (Va. Jan. 11, 1991) (LEXIS, States library).

costs of road construction and number of motor vehicle trips generated by different types of land use.⁵⁴ This development of the nexus test was both confirmed and overshadowed by the United States Supreme Court in 1987.

VI. The *Nollan* Doctrine

Decided on the last day of the United States Supreme Court's 1987 Term, *Nollan v. California Coastal Commission*⁵⁵ deals ostensibly with beach access. The plaintiffs sought a coastal development permit from the California Coastal Commission in order to tear down a beach house and build a bigger one.⁵⁶ The Commission imposed a condition on the permit, requiring the granting of an easement to permit the public to use one-third of the property on the beach side.⁵⁷ For the privilege of substantially upgrading a beach house, the owner was forced to dedicate to the public lateral access over much of his backyard for more beach for the public to walk upon.⁵⁸ The California Court of Appeals had held this was a valid exercise of the Commission's police power under its statutory duty to protect the California Coast.⁵⁹

The United States Supreme Court reversed.⁶⁰ Noting that the taking of such an access over private property by itself would require compensation, the Court then examined whether the same requirement, imposed under the police or regulatory power of the Commission rather than under its powers of eminent domain, would modify the "just compensation" requirement.⁶¹

The direct holding of the Court was that in this case it did not and that compensation was required.⁶² The rationale of the Court is critical. The Court observed that land-use regulations do not effect takings if they substantially advance legitimate state interests and do not deny an owner the economically viable use of his land.⁶³ But even assuming (without deciding) that legitimate state interests include, in the Commission's words, protecting public views of the beach and assisting the public in

54. No. 900451, at 7.

55. 483 U.S. 825 (1987).

56. *See id.* at 828. *See also* Freilich & Morgan, *Municipal Strategies for Imposing Valid Development Exactions: Responding to Nollan*, 10 ZONING & PLAN. L. REP. 169 (Dec. 1987).

57. 483 U.S. at 828.

58. *Id.*

59. *Id.* at 830-31.

60. *See id.* at 841-42.

61. *Id.* at 831-37.

62. *See id.*

63. *Id.* at 835-36.

overcoming the psychological barrier to the beach created by overdevelopment, the Court could not accept the Commission's position that there was any *nexus* between these interests and the condition attached to Nollan's beach house redevelopment:

It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes.⁶⁴

VII. *Sic Transit* "Linkage"

However, said the Court, it is an altogether different matter if there is an "essential nexus" between the condition (read impact fee or exaction) and what the landowner proposes to do with the property:

Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. . . . The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. . . . [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them.⁶⁵

In short, the Supreme Court appears to have adopted the "rational nexus" test concerning exactions, in-lieu fees and impact fees, over the broader California rule which apparently affected the imposition of the condition on the Nollan property. The case also means that naked linkage programs⁶⁶ which seek to impose fees, dedications and conditions on the development process merely because the developer needs a permit and the public sector needs an unrelated public project are in all

64. *Id.* at 838-39.

65. *Id.* at 836-37.

66. See, e.g., Bosselman & Stroud, *supra* note 45; Callies, *supra* note 38; Valla, *Linkage: The Next Stop In Developing Exactions*, 2 GROWTH MANAGEMENT STUDIES NEWSLETTER No. 4 (June 1987); Kayden & Pollard, *Linkage Ordinances and Tradi-*

probability also illegal. As one well-known commentator suggests in comments upon a proposed Chicago linkage program:⁶⁷

It will be difficult enough to sustain a housing linkage program on the ground that there is a reasonable relationship between the construction of commercial office space and the need for additional housing. It will be even more difficult to demonstrate that connection when the exacted payments are used for a variety of unknown neighbourhood development projects.⁶⁸

VIII. Post-Nollan Decisions

There has been little time for a substantial body of common law to develop around *Nollan*. So far the few cases that have been decided by lower courts do not give much guidance.

The California courts are testing the extent of the *Nollan* "nexus" language by upholding a California Coastal Commission permit requirement that a club impose a membership condition precluding discrimination in order to obtain a commission development permit.⁶⁹ The court reasoned that:

Here, in contrast [to *Nollan*] there is a direct connection between the governmental purpose of maximizing public access to state beach land, and the condition which was imposed. Again, by precluding discrimination against minorities in the club's membership policies, the Commission maximized the possibility that all segments of the public will have access to the legal land.⁷⁰

An appellate case interpreting *Nollan* more narrowly is easily distinguishable as it deals solely with the question of who should pay for public access.⁷¹

It has also been suggested that the *Nollan* case will force local governments to reexamine their "traditional" subdivision exactions for such

tional Exactions Analysis, 50 LAW & CONTEMP. PROBS. 127 (1987); Alterman, *Evaluating Linkage and Beyond*, 34 WASH. U.J. URB. & CONTEMP. LAW 3 (1988); D. CALLIES & R. FREILICH, CASES & MATERIALS ON LAND USE ch. 4 (1986). *But see* Holmdel Builders Ass'n v. Township of Holmdel, 121 N.J. 550, 583 A.2d 277 (1990) (upholding impact fees for housing as functional equivalents of mandatory set-asides, which the court had already approved under New Jersey's constitutionally based "fair share" doctrine).

67. See Schwanke, *Local Government and Impact Fees*, 4 J. LAND USE & ENVTL. LAW 215 (1989).

68. Smith, *supra* note 39, at 28.

69. Jonathan Club v. California Coastal Comm'n, 197 Cal. App. 3d 884, 243 Cal. Rptr. 168 (1988).

70. 243 Cal. Rptr. at 178.

71. Augustson v. King County, 49 Wash. App. 409, 743 P.2d 282 (1987). The Maryland Court of Appeals also cited *Nollan* in Maryland Port Admin. v. Q.C. Corp., 310 Md. 379, 529 A.2d 829 (Md. Ct. Spec. App. 1987), but only for the obvious proposition (after *Keystone* and *First Lutheran*) that a taking can occur without a physical invasion. For further discussion, see Callies, *supra* note 11.

as public street dedications in light of the "essential nexus" test to see if they will withstand a takings challenge.⁷² Something of what Justice Scalia meant—and around which he forged his majority in *Nollan*—can be gleaned from his dissent in the recently decided rent control case of *Pennell v. San Jose*.⁷³ In departing from Chief Justice Rehnquist's opinion upholding San Jose's rent control law—and particularly that part which appears to uphold the most controversial provision permitting the denial of rent increases on the basis of a tenant's ability to pay—Justice Scalia distinguishes "traditional" land-use regulations which do not "totally destroy the economic value of property," which he is apparently quite willing to accept.⁷⁴

Traditional land-use regulations (short of that which totally destroy the economic value of property) do not violate this principle because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly. Thus, the common zoning regulations requiring subdividers to reserve certain areas to public streets are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion.

This language is significant for several reasons. First, Scalia appears to accept the "destruction of all economic use" test set forth in *Keystone Bituminous Coal Association v. DeBenedictis*,⁷⁵ the first of the "trilogy" cases, lacking which, a regulation of land is not a taking of property for constitutional purposes. Second, Justice Scalia appears ready to accept a police power basis for such traditional land-use regulation well beyond health and safety, and certainly beyond nuisance. Correcting a social evil is sufficient basis, which smacks of general welfare. Third, traditional exactions such as road dedications and setbacks are legal, always provided there is some sort of connection—like the need to avoid traffic congestion. This is all a far cry from the more extreme potential interpretations of *Nollan*, and far closer to the views expressed by the majority in *Keystone*, from which Justice Scalia joined in vigorous dissent.

Conditions upon land development approvals are now both common and constitutional in the United States. After the United States Supreme Court's decision in *Nollan*, the use of impact fees and exactions will in

72. Bosselman & Stroud, *supra* note 11.

73. 485 U.S. 1 (1988).

74. *Id.* at 20 (Scalia, J., dissenting).

75. 480 U.S. 470 (1987).

all probability continue to proliferate. The need to supplement, if not supplant, traditional sources of revenue at the local government level is acute. So long as there is an adequate, essential, rational "nexus" between the condition imposed and the development-generated problem which it seeks to remedy, there will be no constitutional bar to its use.

IX. Development Agreements: United States Style

Most of the legal issues raised above concerning the need for linkage or nexus and concerns about the taking issue are relatively easily resolved if landowner-developer and local government can come to agreeable terms over what the developer will contribute in exchange for guarantees from the local authority, such as certainty with respect to planning permissions, and memorialize these terms in a statutory development agreement. Thus, development agreements resemble British planning agreements, and, in particular, they symbolise the use of negotiation rather than imposed conditions on new development proposals. But their operation differs in a critical respect, which is that a major advantage to the developer lies in securing a guarantee of development rights. For although a United States developer may have automatic development rights in accordance with the zoning scheme, he has no guarantee that the scheme will not be changed or other regulatory requirements imposed once the development process has commenced. To secure that guarantee on a major project he may be willing to assume substantial infrastructure responsibilities. In Britain, the grant of planning permission is sufficient: The local authority can change its terms unilaterally only if it pays full compensation. But a local government may insist that the developer sign a planning agreement before he is granted a planning permission, and until then he normally has no valuable development rights at all. A planning agreement secures developers' obligations against the land.

Thus, a development agreement in the United States is a contract between a unit of local government and a private holder of property development rights. The principal purposes of the development agreement are to guarantee to the developer which land development regulations will apply to the subject property during the term of the agreement and to guarantee to the local government unit what exactions, improvements and charges the landowner-developer will make and pay during the term of the agreement. The purpose of the agreement is to vest certain development rights in the developer in exchange for the construction and dedication of public improvements. As it is generally legally difficult, if not

impossible, for the landowner-developer to obtain enforceable assurances that land-use regulations may not change during the life of major land development projects, particularly multi-phase development projects extending over many years, and as there are still limits (though they appear constantly to be pushed back by the courts) to what local government can extract as a price for permitting land development,⁷⁶ both parties in theory have adequate reason to negotiate such an agreement.

From a contractual perspective, there is adequate consideration flowing to support such a bilateral agreement. The latter may be particularly important given the frequent use of conditional zoning, which often borders on contract zoning, whereby local government units reclassify property to permit more intense development upon the developer's promise to do certain things which are memorialized in one or more unilateral covenants, duly deposited with the local government and recorded. However, covenants are generally on their face devoid of any mutuality, and local government actions to enforce them have often been unsuccessful. Therefore, a bilateral contract, particularly one which is sanctioned by the state through enabling legislation reciting the public purpose behind such agreement, is by far a more sound way to proceed. Moreover, the unilateral deposit of covenants by the developer noted above provides little assurance that the local government will maintain the zoning for which the promises set out in the covenants were made.

Private sector need for a mechanism to guarantee the continued applicability of existing (or new) development regulations with respect to a particular project grew from dissatisfaction with cases deciding the point at which a landowner's right to proceed with a project, legal when conceptualized or commenced, in the face of changed regulations prohibiting such development. Rooted in the concept of nonconformities, the concept of "vested rights" is variously interpreted throughout the United States to provide that developers are guaranteed to be able to proceed with such developments from after a simple rezoning to only after the issuance of a building permit.⁷⁷ It is holdings in the latter category that prompted vested rights bills to be drafted in two of the states

76. Bosselman & Stroud, *supra* note 45; Blaesser & Kentopp, *supra* note 38.

77. C. SIEMON, W. LARSEN & D. PORTER, VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS (1982). In California, the first state to pass such a bill, it was *Avco Community Developers v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), which galvanized the development community into seeking legislative relief. Despite the expenditure of nearly \$3 million and the rough grading of 74 acres, the California Supreme Court ruled that after state legislation enacted for the protection of the coastal zone was passed, a permit from

with full-blown vested rights/development agreements bills: California and Hawaii.

Implementation has been very rapid since the passage of the California statute. According to a recent survey of over 450 cities and counties, approximately 150 are using the development agreement and another 100 express an interest in using them. Of the former number, over 300 development agreements are in effect with approximately 150 additional such agreements in the process of negotiation. The development agreement appears to be used by cities of all sizes, and for single-stage and multistage projects alike, although predictably the number of such agreements is largest in the larger California cities.⁷⁸

X. Legal Issues: Contracting Away the Police Power and Binding Future Local Governments

It is black letter law in the United States that local governments may not "contract away the police power,"⁷⁹ particularly in the context of zoning decisions.⁸⁰ It is considered to be against public policy to permit the bargaining of zoning and subdivision regulations for agreements and

the agency upon which the coastal protection responsibility was conferred was necessary before Avco's rights to continue developing vested. *Id.* at 550-55. This was because such rights did not vest in California until the issuance of a building permit, even though developers incurred substantial costs prior to the issuing of such a permit. *Id.*

In Hawaii, the second state to pass a development agreements bill (modeled extensively after the California bill), the bill was spawned by *County of Kauai v. Pacific Standard Life Ins. Co.*, 65 Haw. 318, 653 P.2d 766 (1982), colloquially known as the "Nukoli" case after the beach upon which the proposed hotel and condominium development was to be constructed. There, the Hawaii Supreme Court held that rights to develop did not vest until a last discretionary permit was issued. *Id.* at 776. As it happened, that last discretionary permit was held to be the holding of a referendum on the applicable beach zoning, since the petition for the placing of rezoning on the ballot was certified before shoreland management permits—normally the last discretionary permits in the land development process in the County of Kauai at that time—were granted. *Id.* Hawaii has since declared initiatives and referenda to be illegal means for addressing zoning issues in Hawaii. *Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989). See Callies, Neuffer & Caliboso, *Ballot Box Zoning: Initiative, Referendum and the Law*, 39 WASH. U.J. URB. & CONTEMP. L. 53 (1991).

78. Cowart, Kresmodel & Stewart, *Development Agreements: Widespread Use Exceeds Expectations*, 1986 QUARTERLY REPORT, CENTER FOR REAL ESTATE AND URBAN ECONOMICS, UNIVERSITY OF CALIFORNIA, BERKELEY (4th Quarter).

79. *Carlino v. Whitpain Investors*, 499 Pa. 498, 453 A.2d 1382 (1982).

80. *Cederberg v. City of Rockford*, 8 Ill. App. 3d 984, 291 N.E.2d 249 (1972); see also *Houston Petroleum Co. v. Automotive Products Credit Ass'n*, 9 N.J. 122, 87 A.2d 319, 332 (1952) ("Contracts thus have no place in a zoning plan and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations."); *Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment*, 8 N.J. 386, 86 A.2d 127 (1952).

stipulations on the part of developers to do or refrain from doing certain things.⁸¹ The equivalent limitation in Britain is that a local authority may not, by contract, fetter the exercise of a statutory discretion. Although the limits to the doctrine are often difficult to discern in practice,⁸² the courts have insisted that it does apply to section 106 agreements.⁸³ Thus, a local authority could not accept a contractual obligation in a planning agreement to grant planning permission in the future for further development, or to refrain from taking enforcement action against unauthorised development.

The prohibition against bargaining away the police power finds its source in the so-called "reserved power doctrine."⁸⁴ Under this doctrine, bargaining away the police power is the equivalent of a current legislature attempting to exercise legislative power reserved to later legislatures.⁸⁵ However, an analysis of the cases indicates that what the courts generally inveigh against is such bargaining away forever, or at least for a very long time. The source of the doctrine, *Corporation of the Brick Presbyterian Church v. Mayor, Alderman and Commonalty of New York*,⁸⁶ involved a municipal abrogation of a lease executed over fifty years before. While some later cases do involve invalidation of municipal action just a few years old, the majority deal with events further back in time. Moreover, a number of such agreements have been upheld by the application of the contracts clause of the United States Constitution which prohibits states from passing laws which abrogate contracts.⁸⁷ In any event, as recent commentators have noted, the current application of the reserved powers clause when used to abrogate government-private contracts has been rare, and courts have attempted to find other grounds to uphold those contracts which are fair, just, rea-

81. *Carlino*, 499 Pa. 498, 453 A.2d 1382; *Zahodiakin*, 8 N.J. 386, 86 A.2d 127 (1952).

82. *R. v. London Borough of Hammersmith and Fulham, ex parte Beddowes*, [1987] 1 All E.R. 369.

83. *Windsor and Maidenhead Royal Borough Council v. Brandrose Investments Ltd.*, [1983] 1 W.L.R. 509.

84. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L. REV. 957, 994-1003 (1987). See also Kramer, *Development Agreements: To What Extent Are They Enforceable?* 10 REAL ESTATE L.J. 29 (1981); Kessler, *The Development Agreement And Its Use In Resolving Large Scale, Multi-Party Development Problems*, 1 J. LAND USE & INT'L L. 451 (1985); Goldwich, *Development Agreements: A Critical Introduction*, 4 J. LAND USE & ENVTL. L. 249 (1989).

85. See *Stone v. Mississippi*, 101 U.S. 814 (1880); *Corporation of the Brick Presbyterian Church v. Mayor, Alderman and Commonalty of New York*, 5 Cowens (N.Y.) 538 (1826) discussed in Kramer, *supra* note 85, at 37-39.

86. 5 Cowens (N.Y.) 538 (1826).

87. *Carruth v. City of Madera*, 223 Cal. App. 2d 688, 43 Cal. Rptr. 855 (1965).

sonable and advantageous to the local government.⁸⁸ In sum, it is unlikely that courts will fall back upon the reserved powers clause in invalidating development agreements passed pursuant to state statute, especially if the agreements have a fixed termination date (as they must under both California and Hawaii's statutory schemes) and that date is not decades away.

In any event, does a development agreement statute provide any relief from such a rule, however infrequently applied? The answer is yes, probably. What the courts which condemn such zoning by agreement inveigh against is the abridgment of powers which protect the general welfare⁸⁹ and the "bartering . . . [of] legislative discretion for emoluments that had no bearing on the merits of the requested amendment."⁹⁰

Since there are yet no reported appellate cases dealing with state development agreement statutes, what an appellate court would say for sure is speculative. However, the prognosis appears to be good, based on cases upholding annexation agreements and cooperative agreements.⁹¹

Moreover, two California Superior Court cases in which development agreements figure prominently basically support the technique, although the validity of the agreements was not ultimately at issue in either.⁹² Indeed, in dicta in *Lincoln Property Co. v. Torrance*,⁹³ the court said:

[I]f the city sought to impose requirements inconsistent or in conflict with the Development Agreement, it would violate rights possessed by Lincoln which are both vested and fundamental [but] . . . the rejection of underground parking, the requirement of "for sale" condominiums and concern about aesthetics and landscaping are not inconsistent or in conflict with the Development Agreement.⁹⁴

88. See *Kramer*, *supra* note 85, at 41; *Carruth*, 223 Cal. App. 2d 688, 43 Cal. Rptr. 855.

89. *Carlino v. Whitpain Investors*, 499 Pa. 498, 453 A.2d 1382 (1982).

90. *Hedrich v. Village of Niles*, 112 Ill. App. 2d 68, 250 N.E.2d 791 (1969).

91. See, e.g., *Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3d 724, 130 Cal. Rptr. 196 (1976) (annexation and zoning and sewer connections for annexation and annexation fees); *Housing Auth. v. City of Los Angeles*, 38 Cal. 2d 853, 243 P.2d 515 (1952) (redevelopment agreements); *Meegan v. Village of Tinley Park*, 52 Ill. 2d 354, 288 N.E.2d 423 (1972) (interpreting limitations on a pre-statute annexation agreement, thereby upholding the process by implication); *Mayor and City Council of Baltimore v. Crane*, 227 Md. 198, 352 A.2d 786 (1976) (redevelopment agreements); *Housing Redevelopment Auth. v. Jorgensen*, 328 N.W.2d 740 (Minn. 1983) (low-rent housing for zoning).

92. See *Continental Development Corp. v. Hart*, No. C617808, slip op. (Super. Ct. County of Los Angeles, California, Oct. 21, 1986); *Lincoln Property Co. v. City of Torrance*, No. C607339, slip op. (Super. Ct. County of Los Angeles, California, Nov. 4, 1986).

93. *Lincoln Property Co.*, slip op.

94. *Id.*, slip op. at 3.

Finally, what informed commentary there has been on the various statutes appears to agree that courts should have little difficulty in supporting development agreements against reserved powers/bargaining away the police power claims, especially if there is supporting state legislation.⁹⁵ In sum, development agreement statutes and their provisions for freezing land-use controls in exchange for infrastructure and public facility dedications will probably be upheld.

XI. Britain: Planning Gain and the Validity of Section 106 Agreements

There is no parallel in British case law to the detailed United States analysis of allocating off-site development costs, yet the seeds of a similar underlying concern are apparent. For a start, there has been very little litigation. This reflects not only the comparatively limited function of judicial review in Britain, but also a want of informed and interested plaintiffs. Planning gain deals tend to be negotiated individually and opportunistically. Rarely are the full details publicised. Developers' contributions to the public costs of providing physical infrastructure, particularly highways, are now commonplace and unremarkable. There is in practice no formal test of a proportional relationship between the need generated by the development and the sum contributed, and deals are negotiated individually. The actual relationship therefore depends to a large extent on the bargaining strength of the parties. A developer may be willing to contribute beyond his share if it means that development can start earlier, or if he can devise some way of recovering contributions subsequently from neighbouring developers (such as by controlling access to the facilities provided). Moreover, there is no general requirement that the contribution be earmarked for the specified purpose, and there has been some concern in the past that certain types of contribution, such as commuted car parking payments, have never been properly applied.

95. DEVELOPMENT AGREEMENTS: PRACTICE, POLICY, AND PROSPECTS (Porter & Marsh, eds. 1989). Wegner, *supra* note 85; Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990). Kessler, *supra* note 85; Hagman, *Development Agreements*, 3 ZONING & PLAN. L. REP. 65 (1980); D. Callies, *Land Development Regulations in C.D. SANDS & M. LIBONATI, supra* note 24, at § 16.55; ABBOT, D. CALLIES & W. HOLLIMAN, DEVELOPMENT AGREEMENTS AND VESTED RIGHTS: A SECOND LOOK (1983); Holliman, *Development Agreements and Vested Rights In California*, 13 URB. LAW. 44 (1981); LEAGUE OF CALIFORNIA CITIES, DEVELOPMENT AGREEMENTS (1980); Zeid, *Land Use Planning By Agreement: The Practice in England and California* (draft law review note); CURTIN, CALIFORNIA LAND USE AND PLANNING LAW (1986); D. MANDELKER, *supra* note 24, at § 6.21; Kramer, *supra* note 85. *But see* for a different view, Crew, *Development Agreements After Nollan v. California Coastal Comm'n*, 22 URB. LAW. 23 (1990).

The real public concern, however, is with deals going beyond these, such as where a developer agrees to provide some non-essential or unrelated facility. These deals are rarely challenged. Where challenge has occurred, it has generally been to the wrong thing: the legal instrument used (a statutory agreement) rather than the substance of the deal (the grant of planning permission in return for making the contribution). The question of the lawful scope of section 106 agreements has recently become one of the most confused areas of contemporary planning law, as the result of a series of recent judicial rulings which are substantially at odds with contemporary practice (and appear indeed to be generally ignored by practitioners). The problem started with some dicta in the Court of Appeal in *Bradford City Council v. Secretary of State for the Environment*,⁹⁶ where Lloyd, L.J., observed:

I do not accept [counsel for the Secretary of State's] submission that the present condition would have been lawful if incorporated in a [section 106] agreement. If the condition was manifestly unreasonable, and so beyond the powers of the planning authority to impose it, whether or not the developers consented, it must follow that it was also beyond the powers of the planning authority to include the condition as "an incidental or consequential provision" of an agreement restricting or regulating the development or use of land under [section 106].⁹⁷

The first difficulty is with the words "it must follow," because the logic of the progression is anything but clear. Section 106 does not restrict the normal contractual power of a local planning authority. Its purpose is to allow certain types of agreement (those regulating or restricting the use or development of land) to be enforceable against successors in title. Although an agreement may fall outside section 106, it may still be contractually enforceable, unless, of course, the Court of Appeal is urging a different test for all local authority contracts from that applicable to private individuals. Moreover, the analysis concentrates only on section 106, leaving to one side the other statutory powers under which enforceable agreements may be concluded.⁹⁸ Since it is customary for an agreement to recite that it is made under each and every of these statutory provisions, there is great practical difficulty in unpicking the details.

Secondly, the argument proceeds from the assumption that a term requiring the payment of money is manifestly unreasonable. The established doctrine appears to be that such a payment may not be insisted upon by a planning condition, although it may be in lieu of meeting a legitimate planning requirement, because any such requirement would be regarded

96. [1986] J.P.L. 598, (1986) 53 P. & C.R. 55.

97. *Id.*

98. *Id.*

as doctrinally unreasonable whatever its economic justification.⁹⁹ That may be a sensible approach to unilaterally imposed planning conditions, but there seems little justification for transposing it across to negotiated agreements. Moreover, the Court of Appeal appears to have confused the basis of the doctrine when it proceeded to suggest that:

That is not to say that this might not have been a case for a more limited agreement under [section 106]. A contribution towards the cost of [road widening] might well have been reasonable, due to the increased use of the road resulting from the development, and the benefit to the occupiers of the residential development: see Circular 22/83, "Planning Gain," where the considerations are well set out in ¶¶ 6-8. See also ¶¶ 3 and 6 of Appendix A. But I need not pursue that consideration further. For there is all the difference in the world between a provision of a [section 106] agreement requiring a contribution from a developer towards the cost of widening a highway and a provision which requires the entire works to be carried out at his risk and expense.¹⁰⁰

But again the position is more complex than this. It is difficult to comprehend why a developer should not be able to agree to contribute the total cost of infrastructure provision, even if it goes beyond that attributable solely to his development, if he can thereby ensure that development will commence promptly, rather than still having to wait for the public agency to allocate its share of the capital. It is also puzzling to see the Court of Appeal elevate policy statements by a government department to the status of rules of law, without offering any separate independent analysis of the legal principles involved.

Anecdotal evidence suggests that the dictum, in practice, is widely ignored or simply not understood. Yet an attempt by counsel in *R. v. Westminster City Council, ex parte Monahan*¹⁰¹ to have it reviewed was unsuccessful. Kerr, L.J., said (although again his comments were purely *obiter*):

Mr. Boydell [Counsel for the Opera House] submitted that the powers of a planning authority under [a section 106 agreement] were wider than under section [70(1)] and that the contrary view expressed by Lloyd L.J. in an *obiter* passage in *Bradford* was

99. For the somewhat obscure basis for this rule, see M. GRANT, URBAN PLANNING LAW 343-45 (1982). The traditional approach is, however, upset by two recent developments: (1) the Court of Appeal's ruling in *R. v. Richmond upon Thames Borough Council, ex parte McCarthy & Stone (Developments) Ltd.*, [1990] 2 P.L.R. 109, to the effect that a local authority may be generally entitled to make charges for things that it does (as opposed to imposing taxes) by virtue of its power under the LOCAL GOVERNMENT ACT 1972, § 111, to do anything which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions (though this may now have to yield to a more restrictive approach taken by the House of Lords on that provision in *Hazell v. London Borough of Hammersmith and Fulham* (Jan. 24, 1991)); and (2) by the LOCAL GOVERNMENT AND HOUSING ACT 1989 creating a specific statutory charging power, which could by regulations be adapted to infrastructure charges.

100. [1986] J.P.L. 598; (1986) 53 P. & C.R. 55.

101. [1989] J.P.L. 107; [1989] 1 P.L.R. 36.

incorrect and should not be followed. While it is equally unnecessary to express any concluded view on this question in the present case, I would certainly not accept that submission as a general proposition. [Section 106] agreements undoubtedly facilitate the formulation of qualified planning permissions in comparison with the imposition of express conditions, and no doubt they also simplify the procedural aspects of the planning process in many ways. They have the advantages of the flexibility of a negotiable agreement in contrast to a process of unilateral imposition; and they are therefore no doubt far less vulnerable to the risk of successful appeals or applications for judicial review, which is to be welcomed. But if a particular condition would be illegal—on the ground of manifest unreasonableness or otherwise—if it were imposed on an applicant for planning permission, then it cannot acquire validity if it is embodied in a [section 106] agreement, whether at the instance of the applicant himself or not.¹⁰²

But the High Court on two occasions now has taken a different approach. In *R. v. Gillingham Borough Council, ex parte F. Parham Ltd.*,¹⁰³ the Court interpreted the “manifestly unreasonableness” test as procedural rather than substantive. Thus, Roch, J., observed that a section 106 agreement “must be such as a reasonable planning authority, duly appreciating its statutory duties, could have properly imposed [*sic*]”¹⁰⁴

And in *R. v. Wealden District Council, ex parte Charles Church South East Ltd.*,¹⁰⁵ the Court, citing that decision (including its reference to *Bradford*) but not referring at all to the more recent *Westminster*¹⁰⁶ case, agreed with that approach and observed that “it is otherwise difficult to see what the purpose of section 106 is, if the powers under it are no greater than the powers to impose conditions.”¹⁰⁷

Perhaps the most appropriate approach to section 106 agreements is to recognise, as the United States courts have done with development agreements, that they are fundamentally contractual in nature, and that, although the procedure adopted by an authority in negotiating an agreement may be subject to challenge through judicial review, the substantive validity of the agreement should be determined applying contractual principles. In attempting to artificially reduce the scope of section 106 so as to restrain the power of authorities to impose exactions, the courts have misdirected their attention to the wrong phase of the planning process. The question should be whether the decision to grant plan-

102. *Id.*

103. [1988] J.P.L. 336; [1988] 1 P.L.R. 7.

104. *Id.*

105. [1989] 59 P. & C.R. 150; [1989] J.P.L. 837.

106. *Id.*

107. The agreement which the court upheld made provision for the developer financing the construction of a traffic gyratory system (known as a “roundabout”) at an existing highway junction, the construction of foul and surface water drainage and the laying out and donation of a play area and an open space woodland area. *Id.* The applicants, who proposed to develop adjoining land, complained that the burden was too low and meant that they would be forced to accept a heavier infrastructure burden under a section 106 agreement on their own land. *Id.*

ning permission, on an application which is related to a section 106 agreement, is based solely upon material considerations. To the extent that it follows from an unrelated inducement by the developer, whether or not recorded in a section 106 agreement, it is open to challenge. An appropriate test would be the *Nollan* test of rational nexus, not only because it embodies what a "material" consideration should entail, but also because it concentrates on the substance of the relationship rather than on the form of the transaction (land, money or facility) or the legal instrument used to record it.

XII. Conclusions

It is dangerous to draw precise conclusions from a limited comparative analysis such as this. The issues raised by the phenomenon of developers' contributions to public costs are complex, and market conditions and planning controls vary considerably within and between Britain and the United States. The courts in both countries have come to accept that it is appropriate for local governments to look to developers for contributions to providing public services, but have been anxious to establish limits so as to ensure that powers conferred to regulate land development are not misused. The necessity to avoid falling foul of the "taking" doctrine has meant that United States local governments have always had to be in a position to justify their rules in case of constitutional challenge, and hence to pursue openness and economic transparency, while their British counterparts, faced with inadequate and conflicting guidance, have taken what advantage they could of economic expedience under conditions of secrecy. It is also fair to observe that under the current state of the law in each country, the development agreement is more useful to local government in the United States for the relatively (legally) unrestricted negotiation for public facilities and amenities to be provided by the landowner, than it is to the local government counterpart in the United Kingdom. If the United States local government must take care to avoid a "takings" challenge in the first instance of exactions and impact fees, these issues are more or less resolved through a development agreement. A United Kingdom local government, on the other hand, may theoretically have a freer hand in applying conditions for necessary infrastructure, but the United Kingdom version of the development agreement has become unnecessarily restricted by the law applying to planning conditions.